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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JERRY WAYNE EANES,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER MD. ANN. CODE, ART. 27, § 121, CRIMINALIZING THE MAKING OF "LOUD AND UNSEEMLY NOISES," MAY BE VALIDLY APPLIED TO PEACEFUL, UNAMPLIFIED POLITICAL AND RELIGIOUS SPEECH ON A DOWNTOWN CITY SIDEWALK.

II. WHETHER MD. ANN. CODE, ART. 27, § 121, WHICH PROHIBITS "LOUD AND UNSEEMLY NOISES," IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

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PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

Petitioner Jerry Wayne Eanes respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in this proceeding on February 8, 1990.

REFERENCE TO REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 569 A.2d 604 (Md. 1990). A copy of the opinion of the Court of Appeals of Maryland is included as pages a-1 to a-54 of the Appendix. Also included are copies of the decisions of the Circuit Courts of Washington County, Maryland, J. Wright at App. a-82, and J Moylan at App. a-86.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

a. The judgment sought to be reviewed was entered on February 8, 1990.

b. No petition for rehearing has been filed. No extension of the time within which to petition this Court for a writ of certiorari has been requested.

c. The statutory provision believed to confer on this Court jurisdiction to review the judgment of the Court of Appeals of Maryland in question by writ of certiorari is 28 U.S.C. § 1257, which provides for review by writ of certiorari from a final decision by the highest court of a State in which a decision could be had, where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Annotated Code of Maryland, Article 27.

§ 121. Obstructing free passage; making unseemly noises; obscene language, etc.

Any person who shall wilfully obstruct or hinder the free passage of persons passing along or by any public street or highway in any city, town or county of this State, or who shall wilfully disturb any neighborhood in such city, town or county by loud and unseemly noises, or shall profanely curse and swear or use obscene language upon or near to any such street or highway within the hearing of

persons passing by or along such highway, or shall wilfully hinder or obstruct the free passage of persons passing on or through or out of the station grounds of any railroad in the State, or who shall wilfully act in a disorderly manner within such station grounds by making such loud and unseemly noises, or by catching hold of and soliciting persons on said grounds against the will of such person, shall, upon conviction thereof, be sentenced to a fine of not less than one dollar and not more than $500 or shall be subject to imprisonment for not more than thirty days, or shall be subject to both such fine and imprisonment, in the discretion of the court and shall pay costs of the prosecution.

Annotated Code of Maryland, Article 27.

§ 122. Disturbance of the peace in public places, at stations or upon public conveyances.

Any person who shall be acting in a disorderly manner to the disturbance of the public peace, or who shall wilfully act in a disorderly manner by making loud and unseemly noises or by profanely cursing, swearing or using obscene language, on or about any public place or any steamboat wharf, dock or public waiting room, or in or about the station grounds of any railroad in the State, or in or on any steamboat, streetcar, electric car, railroad car, passenger train or other public conveyance, or on the mall or adjacent parking areas of any combination of privately owned retail establishments commonly known as a shopping center to which the general public is invited for business purposes, or who shall wilfully catch hold of and solicit persons against the will of said person, or obstruct their free passage to or through or out of such public place, steamboat wharves, docks, public waiting rooms, railroad stations, streetcars, electric cars, railroad cars, passenger trains or other public conveyances, or on the mall or adjacent parking areas of any combination of privately owned retail establishment commonly known as a shopping center to which the general public is invited for business purposes, upon conviction thereof, is subject to a fine not exceeding $500 or imprisonment not exceeding 30 days, or both, with costs imposed in the discretion of the court. Any fine shall be paid pursuant to the provisions of Article 38, § 4. Any person who shall commit any of the crimes, offenses or

misdemeanors as defined by this section may be arrested, tried and convicted as herein provided, in any county or city in this State, where said public place or said shopping center may be located, or in any county or city in this State, from, to or through which the said streetcar, electric car, railroad car, passenger train, or other public conveyance may run, or into which he may be brought by said car or other public conveyance; or in any county or city in the State in which he may be found after said crimes, offenses or misdemeanors have been committed. And any person who shall commit any of the crimes, misdemeanors or offenses herein mentioned upon any steamboat, upon the waters of the Chesapeake Bay, within the limits of this State, and without the body of any county thereof, may be tried in any court of this State having jurisdiction of similar crimes, offenses and misdemeanors of the county in which he may be arrested or into which he may be first brought.

STATEMENT OF THE CASE

I. Course of the Proceedings

This is a petition for a writ of certiorari from the decision of the Court of Appeals of Maryland, rendered on February 8, 1990, affirming the judgment of the Circuit Court for Washington County, Maryland, rendered December 15, 1988. The Circuit Court found the Petitioner, Jerry Wayne Eanes, guilty, on *de novo* review from the Washington County, Maryland, District Court, of disturbing the peace, in violation of Md. Ann. Code, Art. 27, § 121 (1987 Repl.Vol.), by "wilfully disturb[ing] any neighborhood in [any Maryland] city, town or county by loud and unseemly noises...." Petitioner's conduct consisted solely of the peaceful attempt to communicate a message with his voice, unassisted by mechanical amplification, on a public sidewalk in the busy and noisy downtown business district of Hagerstown, Maryland.[1]

[1] The majority of the Maryland Court of Appeals, in affirming Petitioner's conviction, makes clear that his only offense was peaceful preaching on a public street. In the words of that court:

> Preaching on the public street was Eanes's only activity on West Washington Street on 18 May 1988. There is no suggestion that he made any effort to restrain physically anyone who attempted to enter the Clinic or that he tried to block access to the Clinic (*see* Ch. 807, Acts of 1989).

The Washington County District Court found Petitioner guilty of violating § 121. (App. a-84). On December 15, 1988, a *de novo* appeal was heard before Judge Frederick Wright of the Washington County Circuit Court. (App. a-55). Petitioner was found guilty and sentenced to a fine of $250.00, plus payment of Court costs.[2] (App. a-84).

Petitioner appealed, by writ of certiorari, to the Court of Appeals of Maryland. That Court, in a four to three decision, affirmed the conviction, in an opinion filed on February 8, 1990. *Eanes v. State*, 569 A.2d 604 (Md. 1990). No petition for rehearing or reconsideration was filed in that court.

The constitutional issues pertaining to the application and scope of § 121 were raised at all levels of the proceedings. The question of retroactive application of a criminal statute was not raised below, since this only became an issue with the decision of the Maryland Court of Appeals.

In this Court, Petitioner will be referred to by name or as the Petitioner. Respondent will be referred to as the State. References to the Record will be by volume and page number, or by reference to the appendix filed with this Petition.

II. Statement of Facts

On May 18, 1988, the Petitioner, Jerry Wayne Eanes, joined a small group of people who were peacefully picketing in front of the Hagerstown Reproductive Health Services Clinic (an abortion clinic) at 160 West Washington Street in the heart of downtown Hagerstown, Maryland.[3] Mr. Eanes's purpose was to "speak out against abortion,

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> [Petitioner was standing on the sidewalk in front of an abortion clinic.] Nor does the State contend that he threatened anyone with physical violence or that he trespassed on private property. Nor did he attempt to incite his listeners to violence, use profanity or obscenity, or hurl "fighting words" at his listeners.

Eanes v. State, 569 A.2d 604, 606 n.2 (Md. 1990) (portion in brackets supplied).

[2] Petitioner had been originally fined $500.00 in the District Court. (App. a-84).

[3] West Washington Street is a two-lane, heavily traveled street in Hagerstown. Both lanes are normally "filled with traffic" and carry a large number of heavy trucks

to pass out gospel tracts, to try to talk to girls that are walking by [and] the main reason . . . . [was] to preach the Gospel of Jesus Christ." (App. a-70).

During the general time period when Mr. Eanes was present, jackhammers, air compressors, and other pavement-removing equipment were used in close proximity to the abortion center. This machinery emitted a heavy volume of noise (App. a-71 - a-73). Moreover, employees of the abortion center placed large radios in the windows of the building and turned up the volume as loud as possible in an effort to drown out petitioner's speech (App. a-63).[4]

Mr. Eanes spoke against abortion on three occasions on the day in question for two or three minutes at a time (App. a-77). The speech consisted of reading from the Bible and preaching (App. a-64, a-77). His sole intent in raising his voice was to communicate a message to passersby, not to disrupt anyone's activities (App. a-78). In addition, Mr. Eanes at all times spoke with his unaided voice.[5]

Mr. Eanes's actions were entirely peaceful (*See* App. a-56, a-69).[6] His speech did not include any profanity, vulgarity or obscenity. He never urged anyone to take lawless action, and no such lawless action occurred. Mr. Eanes's speech neither advocated nor incited a breach of the peace. Mr. Eanes (and the other members of the group) remained at all times on the public sidewalk and did not

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that "come off the interstate and come through town" (App. a-80). Semi-tractor trailers that must stop at a traffic light at nearby Prospect Street are commonly in the process of shifting their engines as they proceed past the abortion center (App. a-72). The heavy traffic generally produces a high volume of noise. Because of the abortion center building's close proximity to the street, traffic noise can be heard inside the building, even with the windows shut and the air conditioning in use (App. a-57, a-63).

[4] Although the Hagerstown police were present when the radios were played in this manner, no action was taken against the persons who played the radios (App. a-73 - a-74).

[5] Although some witnesses testified that Mr. Eanes's voice could be heard above the general background noise, other witnesses stated that his voice could only be heard "at times" above such noise and that heavier traffic noise "drowned out" Mr. Eanes's voice (*See* App. a-3).

[6] The State conceded this at trial (App. a-56). The Court of Appeals of Maryland agreed. *See* n.1, *supra*.

trespass on private property or disrupt street or sidewalk traffic (App. a-69 - a-70).

On the previous day, May 17, 1988, Mr. Eanes had been tried in Washington County Circuit Court for allegedly making "loud and unseemly" noises in front of the abortion center on July 1, 1987, in alleged violation of Maryland Ann. Code, Art. 27, § 122 (1987 Repl.Vol.). (*See* App. a-86). Judge Moylan exonerated Mr. Eanes of the charges, holding that Mr. Eanes's speech did not constitute a violation of the statute.[7] Until his acquittal on May 17, 1988, Mr. Eanes did not speak on the public sidewalk, because, as he testified, "I was afraid that I would be arrested for doing the same thing." (App. a-76).

Despite their awareness of Mr. Eanes's acquittal the previous day, the Hagerstown police again arrested Mr. Eanes. This time, they charged him with violating Maryland Ann. Code, Art. 27, § 121, which proscribes "loud and unseemly noises." Even though Mr. Eanes's conduct on May 18, 1988, differed in no material manner from the actions for which he had just been acquitted, this time he was convicted and fined $250.00.

ARGUMENT

I. MARYLAND ANN. CODE, ART. 27, § 121, CRIMINALIZING THE MAKING OF "LOUD AND UNSEEMLY NOISES," CANNOT BE VALIDLY APPLIED TO PEACEFUL, UNAMPLIFIED POLITICAL AND RELIGIOUS SPEECH ON A DOWNTOWN CITY SIDEWALK.

In this case, the highest court in the State of Maryland determined for the first time in the history of First Amendment adjudication that peaceful expression of political and religious speech on a downtown city sidewalk, in the form of the human voice, can be criminally punished merely for being too loud. Based upon wholly subjective criteria – specifically, whether the speech is "unreasonably" loud, coupled with complaints and a police warning – the State of Maryland is empowered to use the full force of its criminal

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[7] The copy of the transcript of Judge Moylan's opinion and ruling from the bench appears at App. a-86 through a-92.

prosecutorial machinery to stifle protected natural speech in its "most pristine and classic form."[8] Under the rationale of this ruling, a citizen's freedom to participate in the time-honored tradition of peaceful public discourse is conditioned upon the ability to voluntarily modulate one's voice to fit the comfort level of the most sensitive hearers as determined by the police or other agents of the State.

A. Maryland Ann. Code, Art. 27, § 121 Is Unconstitutional As Applied To Peaceful Political And Religious Expression.

Courts of the State of Maryland have historically disagreed sharply as to the constitutional applicability of Article 27, § 121 to protected free speech activity. At the trial court level, two courts of concurrent jurisdiction arrived at diametrically opposed conclusions as to whether the Petitioner could be prosecuted for doing nothing more than preaching on a busy city sidewalk in a commercial zone during regular business hours.[9] At the appellate level, as is apparent from the dissent in this case, judges are sharply divided over this statute's application in a free speech context. The history surrounding judicial construction of § 121 suggests that this has been a sensitive constitutional issue for many years.

This is not the first time certiorari to this Court has been sought to effect a resolution to this constitutional conundrum. In *Diehl v.*

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[8] *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

[9] The State Attorney's office was apparently not satisfied with Judge Moylan's application of this Court's reasoning in *Edwards v. South Carolina*, *infra*, since it advised the arresting officers to disregard it:

> [t]here was a confusion among my supervisors in reference to a decision handed down by Judge Moylan the previous day and we were advised by Captain Hart to leave the area until we got a ruling from the State's Attorney's office.

After receiving another complaint about the preaching in front of the clinic, the officer returned and

> was advised that the State's Attorney stated that Moylan's decision was in reference to that case only, that if anybody was disturbing the peace and I had probable cause to make an arrest to go ahead and make an arrest.

See Eanes, 569 A.2d at 621.

State, 294 Md. 466, 451 A.2d 115 (1982), *cert. denied*, 460 U.S. 1098, 103 S.Ct. 1798, 76 L.Ed.2d 363 (1983), the Maryland Court of Appeals construed the meaning of the phrase "loud and unseemly noises" in Art. 27, § 121 very narrowly, permitting only a limited application of this statute to protected speech. In that case, a police officer stopped a car for a traffic violation. When the passenger, Diehl, got out of the car, the officer ordered him back into his vehicle. Diehl responded by *screaming* at the officer, "Fuck you, Gavin," "I know my rights" and "you can't tell me what to do." *Id.* at 468, 451 A.2d at 116.[10] Diehl was subsequently charged and convicted of a violation of Art. 27, § 121.

Recognizing that the proscription against "loud and unseemly noises" could be interpreted so as to prohibit protected First Amendment activity, the Court of Appeals in *Diehl* held, in a manner consistent with this Court's rationale in *Ward* and *Frisby*,[11] that § 121 was inapplicable to speech protected under the First Amendment. "Once this communication has been defined as speech, it is clear that the statute does not apply in light of Diehl's First Amendment rights in this communication." *Id.* at 472, 451 A.2d at 118-19.[12]

In its re-examination of § 121 in this case, however, the dissenting justices in *Diehl* now have the majority, and they have seized this opportunity to apply, in a retroactive manner, a new and novel construction of the phrase "loud and unseemly noise." In so doing, the Court of Appeals has retreated from its earlier, constitutionally sound position. The limiting rationale in *Diehl* now applies only to attempted enforcement of § 121 on the basis of the content of the speech.[13] The retroactive application of this new statutory construction is sharply

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[10] As the *Eanes* dissent points out, loudness was an issue before the Court in *Diehl*. *Eanes*, 569 A.29 at 634 (Eldridge, J., dissenting).

[11] See *infra* at Section I.B.

[12] The court held that the phrase "loud and unseemly noises" could encompass communications made in a loud manner *only* if they presented a clear and present danger of violence, or were not intended as communications, but merely as a guise to disturb other persons. *Diehl*, 294 Md. at 472, 451 A.2d at 118-19.

[13] In referring to *Diehl*, the majority now states that "the *Diehl* limitation on which Eanes relies is only applicable when the prohibition against 'loud and unseemly noise' seeks to regulate the content of speech." *Eanes*, 569 A.2d at 608.

criticized by the dissenting justices as a serious violation of due process.[14]

It is this departure from the Court of Appeals' former position in *Diehl* that gives rise to constitutional concerns. Without the *Diehl* limitation on this statute, the door is opened wide for criminal prosecution of a broad range of free speech activity previously recognized by this Court to be fundamentally protected.

In *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963), this Court struck down a conviction under South Carolina's breach of the peace statute. The factual similarities between this case and *Edwards* are striking. In *Edwards*, some 187 student demonstrators marched on a downtown city sidewalk in Columbia, South Carolina, and spoke out on another issue of public concern - racial discrimination. After several complaints, the protesters, like Eanes, were warned that unless they ceased their activity they would be arrested. One of the protest leaders delivered a "religious harangue" while others loudly sang religious songs, stamped their feet and clapped their hands. *Edwards*, 372 U.S. at 233. In reversing Edwards' conviction, this Court stated:

> We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case.

Id. at 236 (footnote omitted).

This Court did not hesitate to reaffirm its position in *Edwards* when, two years later, it declared unconstitutional the application of Louisiana's disorderly conduct statute to punish public expression in the form of loud cheering and singing on a public sidewalk in downtown Baton Rouge. *Cox v. State of Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). *Accord Grayned v. City of Rockford*, 408 U. S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (noisy

[14] *Eanes*, 569 A.2d at 635 (Eldridge, J., dissenting).

demonstrations are still protected speech and may be curtailed only by narrowly tailored statutory restrictions as to time, place and manner).

This Court's decision in 1983 to deny certiorari from the Court of Appeals' decision in *Diehl* had the predictable result that Art. 27, § 121 would be applied in a manner consistent with this Court's prior decisions in *Edwards*, *Cox* and *Grayned*. Indeed, this was the foundation for Judge Moylan's acquittal of Eanes on May 17, 1988. Now, however, in a sudden turnaround, the constitutional safeguards inherent in *Diehl's* narrowly tailored interpretation of § 121 have been removed. Unless certiorari is granted, there will be an equally predictable result - the uneven or unprincipled application of § 121 and the evisceration of fundamental rights protected under the free speech and free exercise clauses of the First Amendment.

B. Certiorari Is Necessary To Avoid An Unconstitutional Expansion Of This Court's Decisions In *Ward* and *Frisby*.

The adjudicative facts invoking the application of Maryland's criminal disorderly conduct statute, Art. 27, § 121, are succinctly stated in the Court of Appeal's opinion. Eanes's only activity prompting his arrest was "preach[ing] the gospel of Jesus Christ."[15] As stated in footnote one, *supra*, it is undisputed in this case that Eanes's preaching was well within the confines of traditionally protected free speech activity. Nonetheless, by giving this statute a novel and retroactive construction, the majority of the Maryland Court of Appeals found this pure speech activity susceptible to criminal prosecution if, in the mind of the arresting officer, it is "unreasonably" loud. The Court of Appeals based its authority for this use of police power primarily on this Court's recent holdings in *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) and *Ward v. Rock Against Racism*, 491 U.S. ___, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). In so doing, the Maryland Court of Appeals has issued a broad invitation to over thirty-nine states to enforce similarly worded disorderly conduct statutes in a manner that eviscerates fundamental free speech principles.[16]

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[15] *Eanes*, 569 A.2d at 606.

[16] See App. at a-93, listing comparative state statutes.

The power of the State to abridge freedom of speech on a public sidewalk has been limited by this Court's repeated pronouncements. These form a core constitutional value woven throughout the fabric of First Amendment doctrine. *See Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948); *Kunz v. New York*, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). The Court of Appeals' strained application of *Ward* and *Frisby* stands in blatant contravention of these well-settled pronouncements.

In *Ward*, the focus of inquiry was the same as that in *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949), namely, the regulation of sound amplification devices. As stated by Justice Kennedy, this Court's goal in granting certiorari in *Ward* was "to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech." *Ward*, 109 S.Ct. at 2753. When, as in the case *sub judice*, there is no ostensible issue as to the content of the speech in question, the principal inquiry is two-fold: 1) is the statute narrowly tailored to serve a significant governmental interest, and 2) does it leave open ample alternative channels for communication of the information? *Id.* at 2753.

The most obvious feature that distinguishes Eanes's speech from that involved in *Ward* and *Kovacs*, and the one highlighted in the dissent in *Eanes*, is the absence of any artificial means of amplification. This consideration impacts directly the application of the two prongs of the *Ward* test.

In the first instance, Art. 27, § 121 is not "narrowly tailored," as that term is explained in *Ward*. To the contrary, the application of the statute's prohibition on "loud and unseemly noise" to the natural human voice imposes a substantial burden on a citizen's freedom to engage in peaceful public expression that far exceeds any government interest. As pointed out by the dissent in *Eanes*: "The Supreme Court has never held that the government has a legitimate interest in controlling the volume of unamplified political or social speech delivered in an appropriate place and at an appropriate time."[17]

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[17] *Eanes*, 569 A.2d at 625 (Eldridge, J., dissenting) ("Section 121, as formulated by the Court today, is no more narrowly drawn than the ordinance in *Saia*.").

As this Court recognized in *Kovacs*, there is a qualitative difference between government regulation of the unaided human voice and mechanically amplified sound.

> Only a disregard of vital differences between natural speech, even of the loudest spellbinders, and the noise of sound trucks would give sound trucks [and by implication, music equipment] the constitutional rights accorded to the unaided human voice.

Kovacs, 336 U.S. at 96, 69 S.Ct. at 458 (Frankfurter, J., concurring). For obvious reasons, ordering one to lower one's voice so as not to disturb others lacks the objective element which exists with a sound control board complete with volume control devices.

Secondly, the final requirement in *Ward* of "ample alternative channels of communication" is directly violated by the regulation imposed in *Eanes*. The majority's opinion is an open invitation "to ban [a] particular manner or type of expression at a given place or time."[18] *Ward*, 109 S.Ct. at 2760. In this regard, § 121 is analogous to the complete ban on handbilling discussed at footnote 7 in *Ward*, because it closes the door on a great quantity of "free" speech. The other alternative channels referred to by the majority in *Eanes* involve expenditures of money. As Justice Black stated in *Kovacs*:

> [In such a situation] preference in the dissemination of ideas is given to those who can obtain the support of newspapers, etc., or those who have money enough to buy advertising from newspapers, radios, or moving pictures. This Court should no more permit this invidious prohibition against the dissemination of ideas by speaking than it would permit a complete blackout of the press, the radio, or moving pictures.

Kovacs, 336 U.S. at 103, 69 S.Ct. at 462 (Black, J., dissenting). Left with the Court of Appeals' rendering of § 121, Eanes "must pursue less direct methods of communication, even though there was no finding by the trial court that he could have conveyed his message by

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[18] While the majority deny that § 121 imposes a time restriction, they draw the conclusion that "[o]ne speaking on West Washington Street at midnight . . . could run afoul of § 121 at a lower level of voice volume." *Eanes*, 569 A.2d at 613.

alternative means without disturbing others." *Eanes*, 569 A.2d at 631 (Eldridge, J., dissenting).

Likewise, the majority's reliance on *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), as a justification for the criminalization of pure speech activity on a downtown city sidewalk is a distortion of this Court's narrow holding in that case. As was emphasized again in *Frisby*, the beginning point of inquiry in a free speech case is the "place" or "forum" where the expressive activity takes place. "'[T]ime out of mind' public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum." *Frisby*, 108 S.Ct. at 2499 (citing *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963-64, 83 L.Ed 1423 (1939)). And as this Court was careful to point out, this phrase is not a mere "cliche," and "stringent standards" must be applied to any governmental attempt to restrict free speech in such public fora. *Id.* at 2500.

As with its application of *Ward* to this case, however, the Court of Appeals misapplied this Court's instruction in *Frisby* regarding the narrow tailoring requirement. The ordinance in *Frisby* survived this test because this Court narrowly construed the ban to apply only to "focused picketing taking place solely in front of a particular residence . . ." *Id.* at 2501. In the case at bar, however, the majority acknowledged at the outset "that [Eanes's] purpose was to preach to the entire neighborhood,"[19] which was located in a primarily *commercial* zone.

The key distinction between Eanes's activity and that involved in *Frisby* is obvious, as was expressly recognized by this Court: "In such cases 'the flow of information [is not] into . . . . household[s], but to the public.'" *Frisby*, 108 S.Ct. at 2503 (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420, 91 S.Ct. 1575, 1578, 29 L.Ed. 2d 1 (1971)). This Court further stated: "The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident. . . ." *Id.* at 2503.

As a consequence of the Court of Appeals' exaggeration of the holdings in *Ward* and *Frisby*, the power of the State to abridge protected pure speech is greatly expanded. Such a precedent, if

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[19] *Eanes*, 569 A.2d at 606.

allowed to stand, will undoubtably lead to a realization of the fears expressed in the dissenting opinions in both of these decisions. Article 27, § 121, when applied to this form of speech activity, operates at the core of the First Amendment. Certiorari is therefore necessary to assure that these recent clarifications in the appropriate tests and standards to be applied in resolving free speech controversies are not misapplied.

C. The Court Of Appeals' Retroactive Application Of Its Broad Construction Of Art. 27, § 121 Violates The Due Process Clause Of The Fourteenth Amendment.

A fundamental principle of due process in criminal prosecutions is that the accused be made aware and given sufficient notice of acts that will be construed as a violation. When an "unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law . . . ." *Bouie v. City of Columbia*, 378 U.S. 347, 354-55, 84 S.Ct. 1697, 1703, 12 L.Ed.2d 894 (1964). As Justice Powell more recently observed in *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977): "We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values." *Id.* at 196, 84 S.Ct. at 995 (a case condemning the retroactive application of this Court's so-called "*Miller*" test for determining obscenity).[20] Eanes's activity, of course, implicates First Amendment values in their most classic and pristine form.

This Court's instruction in *Marks* has even greater force in the case at bar where the statute in question contains "sweeping language to describe that which is forbidden." *Marks*, 430 U.S. at 195, 97 S.Ct. at 994. Clearly, the Court of Appeals' construction of Art. 27, § 121 in the case *sub judice* casts a significantly wider net than its prior construction in *Diehl*. The Court of Appeals in *Diehl*, in a decision by now dissenting Justice Cole, held that *loud and unseemly noise*

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[20] In *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), this Court expanded the test for obscenity by replacing the "utterly without redeeming social value" standard with the "lacks serious literary, artistic, political or scientific value" test.

cannot qualify as a basis for criminal disorderly conduct because, "[a]s speech protected by the First Amendment, Diehl's conduct must have advocated imminent lawless action and been likely to incite a breach of the peace in order to be proscribable by the State." *Diehl*, 294 Md. at 472, 451 A.2d at 119.[21]

As recognized by dissenting Justices Eldridge, Cole and Blackwell, however:

> The majority today states that the *Diehl* test for "loud and unseemly noise" prohibited by the statute applies only where the conviction is based "on allegedly objectionable content," and that where the prosecution is based on "loudness," the statutory phrase means "unreasonably loud."[22]

In addition to removing *Diehl's* constitutional safeguard, however, the lower court's modification of *Diehl* merely substitutes one vague phrase for another. While the net effect of such a retroactive application of this new statutory construction to past conduct is the same here as in *Marks*, the potential chilling effect on free speech is far greater. Whereas *Marks* involved a relatively small segment of speech (i.e., potential pornography), the Court of Appeals' decision in the present case reaches, in unprecedented fashion, to the very genesis of all free speech activity - the spoken word of an unaided human voice.

II. CERTIORARI IS NEEDED BECAUSE WITHOUT THE *DIEHL* LIMITATIONS MARYLAND ANN. CODE, ART. 27, § 121, PROHIBITING "LOUD AND UNSEEMLY NOISES," IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Any regulation of speech, including content-neutral time, place and manner restraints, must be properly framed so as not to be unconstitutionally vague or overbroad. *See Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948) (invalidating a time, place and manner restriction on the use of sound amplification device). *Cf. Coates v. City of Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29

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[21] Clearly, under the *Diehl* standard, Eanes's speech would not be punishable since the majority stipulates that none of these factors were present. *See Eanes*, 569 A.2d at 606 n.2.

[22] *Eanes*, 569 A.2d at 634 (Eldridge, J., dissenting).

L.Ed.2d 214 (1971) (invalidating as vague a statute that prohibited three or more persons from assembling and conducting themselves in an "annoying" manner). It is at precisely this crucial point that Art. 27, § 121, without the limiting construction of *Diehl*, fails to pass constitutional muster.

A. Article 27, § 121 Is Unconstitutionally Vague.

With the *Diehl* limitations, Art. 27, § 121 puts a person of average intelligence on notice as to what pure speech activities would fall within its prohibition. Thus, the stringent requirement of specificity when dealing with laws affecting speech was satisfied.

As this Court has counseled, statutes restricting pure speech activity must be subjected to the strictest standards governing permissible statutory vagueness. *See Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976) (general test of vagueness applies with particular force in laws dealing with speech). Where statutory vagueness may have an inhibiting effect on speech, a citizen may be required to act at his peril, and the free dissemination of ideas may be the loser. *See Smith v. California*, 361 U.S. 147, 151, 80 S.Ct. 215, 217-18, 4 L.Ed.2d 205 (1959).

In the present case, however, the law in question places a substantial, albeit vaguely defined, burden on the speaker that is impossible to bear. The Court of Appeals' new construction of "unseemly" as a modifier of "loud," rather than as a separate element, highlights the vagueness defects of § 121 as interpreted by the court below. Now, a citizen engaged in political speech on a public sidewalk must exercise care not to speak "unreasonably loud." Apparently, the majority anticipated that its new construction of § 121 could lead to arbitrary suppression of protected speech solely on the basis of its volume, so it engrafted into the statute a prior police warning requirement. However, this proposal merely compounds the problem, since no standards or criteria exist for determining what is "unreasonably loud." The Maryland court has told Mr. Eanes, in effect, "you may preach to the general public, so long as you keep the volume of your sermon below an unreasonable level." But who or what determines speech to be at an unreasonable level? Such is left to the arbitrary standards of the State and its agents to define. A vague law, such as § 121, impermissibly delegates basic policy matters to policemen,

judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned*, 408 U.S. at 108-09, 92 S.Ct. at 2299. Moreover, the absence of defined standards, particularly in the context of a criminal statute, poses an unconstitutional chilling effect on fundamentally protected speech. "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked'." *Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d. 222 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377 (1964)).

B. Article 27, § 121 Is Unconstitutionally Overbroad.

The overbreadth doctrine forbids statutory prohibitions that sweep protected activity as well as unprotected activity into their net. As this Court stated in *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed.2d. 830 (1973), the concern of the rule is that "possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."[23]

Article 27, § 121 is overbroad because it delegates standardless, discretionary power to local authorities to stifle protected free speech activity in its most quintessential form. *See, e.g., Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (overturning conviction for participating in civil rights demonstration without a permit.) As interpreted by the majority in the lower court, policemen in the State of Maryland are vested with standardless

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[23] *See also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984) (rationale of overbreadth rule is "the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court"); *New York v. Ferber*, 458 U.S. 747, 768, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113 (1982) ("The doctrine is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'"); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (overbreadth doctrine designed to avoid tolerating a statute susceptible of sweeping and improper application).

discretion to silence public discourse by merely issuing a warning. All that is necessary is that someone complain about the speech.

The obvious danger inherent in such an overbroad statute is that unpopular speech always generates complaints. As this Court recently restated, "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" *Texas v. Johnson*, 109 S.Ct. 2533, 2541 (1989) (citing *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949)).

If there is a bedrock principle underlying the First Amendment, it is that Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.[24] However, if Government is allowed to do so, then the First Amendment itself ceases to serve as a bulwark for expressive activity.

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[24] The very speech which Mr. Eanes was making, i.e., "the gospel of Jesus Christ", has a 2,000 year history of stirring unrest. Acts 4:1-3.

CONCLUSION

For the reasons stated herein, Petitioner urges the Court to grant the writ of certiorari.

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Respectfully submitted,

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